

ORIGINAL

Before the
Federal Communications Commission
Washington, DC 20554

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AUG 26 1994

In the Matter of

Amendment of Section 73.202(b)
Table of Allotments,
FM Broadcast Stations
(Vail, Colorado)

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MM Docket No. 94-55
RM-8454

To: Chief, Allocations Branch

OPPOSITION OF MOUNTAIN HIGH COMMUNICATIONS, INC.

Mountain High Communications, Inc. ("MHC"), by its attorneys, pursuant to the Notice of Proposed Rulemaking, DA 94-599, released July 5, 1994, hereby submits its Comments opposing the request for allotment of Channel 237 to Vail, Colorado, as that community's second local FM service. MHC is the licensee of FM broadcast station KQMT, Eagle, Colorado and five FM broadcast translator stations within KQMT's predicted 3.16 mV/m contour. Vail is within Station KQMT's predicted 3.16 mV/m contour, and one of MHC's translators is licensed to Vail/West Vail. Thus, MHC has standing with regard to this proceeding.

I. Background

As a full Class C station, KQMT is authorized to serve a very large area of Colorado, including Eagle, Vail, Beaver Creek, Aspen, Glenwood Springs and Breckenridge. Because of the extremely mountainous terrain in this area of Colorado, MHC fills in pockets of its predicted 3.16 mV/m contour with translators. The translators are licensed to Vail/West Vail, Breckenridge/Dillon,

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Eagle, Glenwood Springs and Aspen. These five translators all operate on the same frequency, channel 237 (95.3 MHz). It is this same frequency that the Commission now proposes to allot to Vail.

MHC's five translators are within KQMT's primary service area and a new full service station on channel 237 at Vail would displace KQMT's Vail/West Vail and Eagle translators and probably would displace its Breckenridge/Dillon translator also. In addition, depending on where the proposed new Vail station is built, it could interfere with the operation of MHC's other translators.

II. An Allotment of a New FM Station for Vail is Contrary to the Public Interest.

A. The Allotment of an Additional FM Station Would Have a Devastating Impact on the Vail Area Radio Market.

Vail has a year-round population of under 4,000. Because of tourism in the area, the number of people in the Vail area is frequently much higher. In addition to the seasonal increase in its population, the tourist trade has resulted in a correspondingly high number of media outlets, each of which competes against the other for advertising dollars. Despite the influx of thousands of tourists each year, there is strong evidence that the Vail market could not sustain a second local FM service.

There currently are four radio stations in the immediate Vail area. Of those stations, KZYR(FM) is in Chapter 11 and KSKE has recently gone off the air because of financial difficulties. See Articles from Vail newspapers attached as Exhibit A. In addition, a number of stations licensed to other communities serve the Vail area: KYSL, Frisco and KFMU, Steamboat. Combined, there are a

total of six radio stations competing for advertising dollars in Vail.

In addition, radio competes with other local media in the Vail market for advertising dollars. Local publications in the Vail area that sell advertising include Vail Valley Magazine, Vail/Beaver Creek Magazine, Vacation Vail, Dining Guide, Vail Trail (newspaper), Vail Daily (newspaper) and the Eagle Enterprise. Together, these media compete with radio for a diminishing amount of advertising money.

The economic hardships faced by radio stations in the Vail market are not unique. The Commission's decision in BC Docket 80-90¹ to encourage the addition of new FM allotments whenever technically feasible arguably resulted, due to ruinous saturation, in severe economic hardship being visited upon over fifty percent of the FM radio stations in the country. Overcrowding particularly hurt small and medium-sized markets where too much competition has resulted in economic hardship and reduced public service.

In 1991, the National Association of Broadcasters ("NAB") released a study, entitled FM Station Financial Picture, of the condition of the FM market nationwide.² The study revealed that in 1987 the average FM stand-alone station made \$80,045. In 1990, half of all FM stand-alone stations lost over \$15,000, with one-fourth of those stations losing more than \$154,000. The average FM

¹ Notice of Proposed Rulemaking, BC Docket No. 80-90, 78 F.C.C.2d 1235 (1980). See also Report and Order, BC Docket 80-90, 94 F.C.C.2d 152 (1983).

² Mark R. Fratrik, Ph.D., "FM Financial Picture" (National Association of Broadcasters, Washington, DC), February 10, 1991. Attached as Exhibit B.

station saw net revenues decline by 0.9 percent per year between 1987 and 1990. Taking inflation into account, profitability decreased 15 percent during those same years.

Indeed, the Commission itself in its 1992 radio multiple ownership rulemaking proceeding recognized the weakened economic condition of the radio industry.³ The Commission observed:

[T]he dramatic increase in competition and diversity in the radio industry over the last decade, [and] the number of non-radio outlets competing with radio stations for audiences and advertising revenue . . . has produced an extremely fragmented radio marketplace in which existing and future radio broadcasters will be subject to increasingly severe economic and financial stress.

Radio Reconsideration, 7 FCC Rcd at 6387. The Commission noted that the "picture is especially bleak for small market stations." Id. at 6388. Based on these findings, the Commission raised the national radio ownership limit and relaxed the duopoly rule. The Commission should not ignore these findings when deciding whether or not to allot channels for new FM services.

Furthermore, there is evidence that radio stations in vacation markets face even greater hardships. A recent article in Broadcasting & Cable magazine described radio stations in resort areas as "[p]lagued with an overcrowded market, limited advertising revenue and a transient audience"⁴ The article describes how resort-area radio stations suffer from a lack of radio's traditional advertisers, such as automotive services or large

³ Report and Order, MM Docket No. 91-140, 7 FCC Rcd 2755, recon. in part, 7 FCC Rcd 6387 (1992) ("Radio Reconsideration").

⁴ Donna Petrozzello, "Resort Broadcasting is No Picnic," Broadcasting & Cable, August 15, 1994, at 34.

retail chain stores, which do not advertise in vacation markets. Id. These factors make it extremely difficult for radio stations in vacation markets to survive.

In sum, MHC believes that the Commission should consider the potential economic impact of the proposed allotment on the existing radio stations in the Vail area. The Commission's failure to take these factors into account would be contrary to its obligation under the Communications Act to provide the "fair, efficient, and equitable distribution of radio service." 47 U.S.C. § 307(b).

B. MHC Provides a Valuable Public Service to the Communities Within the Vail Area.

The economic hardship that KQMT would face as a result of an allotment of a new FM service at Vail would ultimately affect KQMT's ability to continue providing quality public service programming. In addition, the displacement of certain MHC translators would preclude completely the broadcast of KQMT's public service programming to many areas that are currently reached through these translators. As described below, the public service programming that KQMT provides to its listeners is quite extensive.

Most recently, KQMT was appointed as the Emergency Broadcast Station for Eagle County. In that capacity, KQMT conducts regular tests to insure that the government can effectively communicate with the public during national emergencies.

KQMT broadcasts numerous announcements for local organizations that aid low-income residents. On behalf of the Vail Food Resource Center, a food distribution service, KQMT airs requests for food donations and descriptions of volunteer opportunities. KQMT broadcasts weekly releases from the Sheriff's office regarding

other food distribution centers. In addition, KQMT runs advertising on behalf of the "Thrifty Shop," a Salvation Army store that sells discounted clothing and other household goods.

To help combat crime, KQMT broadcasts a weekly "Crime Stoppers" segment in which local crimes are reported and crime suspects are described. In addition, KQMT airs releases from the Vail Police Department regarding crime-related issues. See Letters attached as Exhibit C.

KQMT, like many stations, airs traffic reports. In addition, however, KQMT offers US West cellular users the ability to call the station at no charge to report accidents and road closings. Because of Vail's mountainous terrain, this information is crucial to area drivers.

KQMT regularly broadcasts "Health Tips." During the recent July 4th holiday, for instance, KQMT invited the police department to broadcast warnings about the dangers associated with over-exertion and alcohol consumption in high altitudes. KQMT also promotes fundraising events held by non-profit organizations, including the American Cancer Society and the Multiple Sclerosis Foundation.

Furthermore, KQMT broadcasts programming to inform area residents about the local school system. For example, KQMT provides air time to the School Superintendent and teachers for the discussion of school-related issues.

In sum, an FCC allotment decision that would affect KQMT's continuing ability to provide public service programming is contrary to the public interest. In determining whether to allot

a new FM local service at Vail, MHC urges the Commission to consider the potential loss of quality public service programming to KQMT's listeners.

- C. There is an Existing Radio Station for Sale in the Vail Market, Thus Obviating the Need for an Additional Allotment.

While MHC believes the Commission should decline to allot a new FM service at Vail based on public interest considerations alone, the fact that there is an existing radio station for sale in the Vail market should be considered by the Commission as well.

Mr. Ryan B. Smith and Ms. Jennifer Tufty ("Petitioners") presumably requested the allotment of channel 237 to Vail so that they could operate a radio station in Vail. Station KSKE-FM, which was placed on the market on July 11, 1994, is a viable alternative to a new allotment. Indeed, KSKE's Class C allotment authorizes it to serve a much larger area than would the proposed new Class A station. The purchase of the existing station would allow petitioners, if they so desire, to own and operate a radio station at Vail. At the same time, it would prevent the further saturation of the Vail radio market.

- D. There is No Transmitter Site Available for the Proposed New Station.

MHC is aware of a submission being made by Gardiner Communications in opposition to the new Vail allocation. That filing establishes that there is no transmitter site in the permissible site location area for this proposed new station because all land in the permissible site location area is within the jurisdiction of the U. S. Forest Service and they will not allow communications sites in the area. MHC agrees with Gardiner's

position -- to the knowledge of MHC, the Forest Service will not allow the development of new electronics users sites in the area identified as the permissible transmitter site location for the proposed new station.

III. Conclusion

For the foregoing reasons, Mountain High Communications, Inc. urges the Commission to decline to allot channel 237 to Vail, Colorado, as that community's second local FM service.

MOUNTAIN HIGH COMMUNICATIONS,
INC.

By: 

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Sharon L. Webber

Arter & Hadden

1801 K Street, N. W., Suite 400K

Washington, DC 20006

Telephone: 202-775-7100

Its Attorneys

August 26, 1994

SLW-00047

EXHIBIT A

Radio DJ says silent station told employees they will not be paid

By Kristin L. Kenney
Daily Mail Writer

A former disc jockey for local radio station KSKE, which shut down Monday, said he was last paid on June 1:

"None of us have been paid since June," said Gary Wolf, who worked for KSKE for almost four years.

On Monday, Wolf said he received a phone call at 4 p.m., telling him he was out of work.

"I was told, 'Don't show up and don't come in anymore,'" Wolf said. He normally worked the 6 to 10 p.m. shift Monday through Friday.

"I asked about getting paid and was told that no one would be paid," Wolf added.

The radio station was under the ownership of Vail Broadcasting Systems Inc., a subsidiary of American Broadcasting Systems Inc., located in Kansas, for the past two years.

The company also owns radio and television stations in Steamboat Springs, Arizona and Florida.

No one at American Broadcasting Systems could be reached for comment.

"It was purely a financial decision," Wolf said of the station shutdown. "The FCC had nothing to do with this. I know the station was billing enough to keep itself afloat, but where the money went, I don't know."

According to Wolf, KSKE employed five full-time people, three part-time staffers and a secretary.

"There were three sales people who quit in May because they hadn't been paid," Wolf said. "People need to realize that the day-to-day workers had nothing to do with the mismanagement over there. They weren't honest with us. Please don't blame us. We were working very, very hard

to keep the station on the air. People were working without pay."

According to Leo Cirbo, an engineer for the Federal Communications Commission in Denver, KSKE was fined last October for \$3,450 after a physical inspection of the station Aug. 25. The fine was later reduced to \$2,850. "They were fined for operating at a reduced power from what they were authorized for an extended period of time without commission approval," Cirbo said.

KSKE operated on the AM dial at 610 kHz and on the FM dial at 104.7 MHz.

On the AM dial, Cirbo said the station was authorized to operate at 5,000 watts, yet it was actually operating at 64 percent of that or 3,196 watts.

On the FM dial, KSKE was authorized at 100,000 watts but was operating at 55,000 watts, according to Cirbo. He said that KSKE later sought approval to operate at the reduced power of 55,000.

Cirbo said there could be several reasons why KSKE was operating at a reduced power.

"The tubes used in the transmitter, as they get old, won't put out that much power," he said. "Also, if they back the power down, the electric bill is not as high."

Cirbo said KSKE was cited for other violations including failure to log their emergency broadcast system tests. Also, the station's public inspection file was missing a couple of items, he said.

Wolf said that he was under the impression that the station was for sale and that a transaction was to occur in two or three weeks.

"They just kept us hanging on," he said. "It just wasn't right. They just treated us horribly. We were just fed so much crap."

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Local radio parent files bankruptcy

By Randy Wyrick
Daily Staff Writer

The parent company of 103.1 KZYR "The Mountain" radio station in Avon has filed for Chapter 11 protection in federal bankruptcy court.

Cliff Gardiner, controlling partner of Avon-based Gardiner Broadcast Partners Ltd., took the company into Chapter 11 reorganization in preparation for taking on a new capital partner, Gardiner said.

"We're doing some restructuring that involves substantial new equity," Gardiner said. "The only way to get this done was to go through Chapter 11. It's a procedure of dealing with existing partners, and it doesn't change control of the company."

Under Chapter 11, Gardiner is freed from the threat of creditors' lawsuits until the company can

Radio

From page 1

reorganize its finances. While the company reorganizes, the court must approve all activities of management, with the ultimate reorganization plan having to be approved by the creditors.

Gardiner Broadcast Partners Ltd. owns stations in Avon (KZYR), Aspen (KSNO), Steamboat (KIDN) and Gunnison/Crested Butte (KKYY).

"The new investors are good, experienced radio people," said Gardiner.

Gardiner said he will remain president of the organization and also said there will be no other personnel changes.

Gardiner, who launched his radio career in 1955 in Liberal, Kansas, started buying radio stations in Colorado in August 1991, when he closed on the purchases of stations in Vail, Breckenridge and Aspen. Later that year, he added the station in Gunnison, and in early 1992 bought a station in Steamboat Springs.

Gardiner said plans call for expansion of the network operation.

Mike Parnell of competing K-SKI wished Gardiner and his company well.

"I hope things work out for them," he said. "It's not good for our industry to lose a radio station."

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Please see Radio page 3

EXHIBIT B

FM STATION FINANCIAL PICTURE

Mark R. Fratrik, Ph.D.

Research and Planning Department

National Association of Broadcasters

February 10, 1991

FM STATION FINANCIAL PICTURE

During the 1970s and through the mid 1980s FM stations, whether part of a local AM/FM combo or operating as a standalone station, made significant gains on their AM counterparts in acquiring audiences. As a result, FM stations revenues increased and the value of their stations increased substantially. At the same time there was a tremendous increase in the number of radio stations, especially FM stations, coming on air. Where in 1970 there was 2,636 FM stations on air, by the end of 1991 there was 6,036 stations. Adding even more competition in the early 1990s was the emergence of new cable audio services.

Since the mid 1980s the increase in competition both from within and outside the radio industry has left many FM stations finding themselves in precarious financial positions. Even before the recent downturn in the economy many FM stations were losing substantial amounts of money. For 1990, the most recent data available, the average FM standalone station lost \$14,908.¹ Half of all FM standalone stations lost more than \$15,715, with one-quarter of these stations losing more than \$154,210. While the results for 1991 are not available, it is clear that the financial fortunes of these stations has not improved. Added to the competition FM stations now face, the recent downturn in the industry due to the recession has lowered industry revenues.²

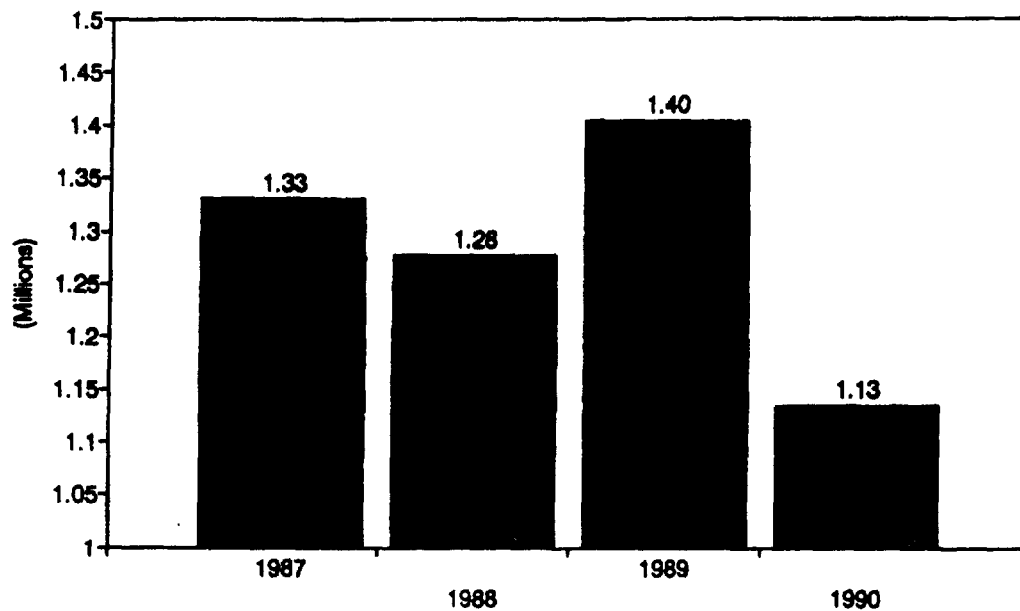
The poor performance in recent years is just the culmination of pressures faced by FM stations in recent years. The average FM station saw its net revenues decline -0.9% annually from 1987 through 1990. This decline did not take into account the impact of inflation, which

¹ All of the data presented are from the *NAB/BCFM Annual Radio Financial Reports*, which reports on the data collected from a census of all commercial radio stations collected each year.

² The Radio Advertising Bureau estimates that the radio industry advertising revenues decreased 3.1% in 1991.

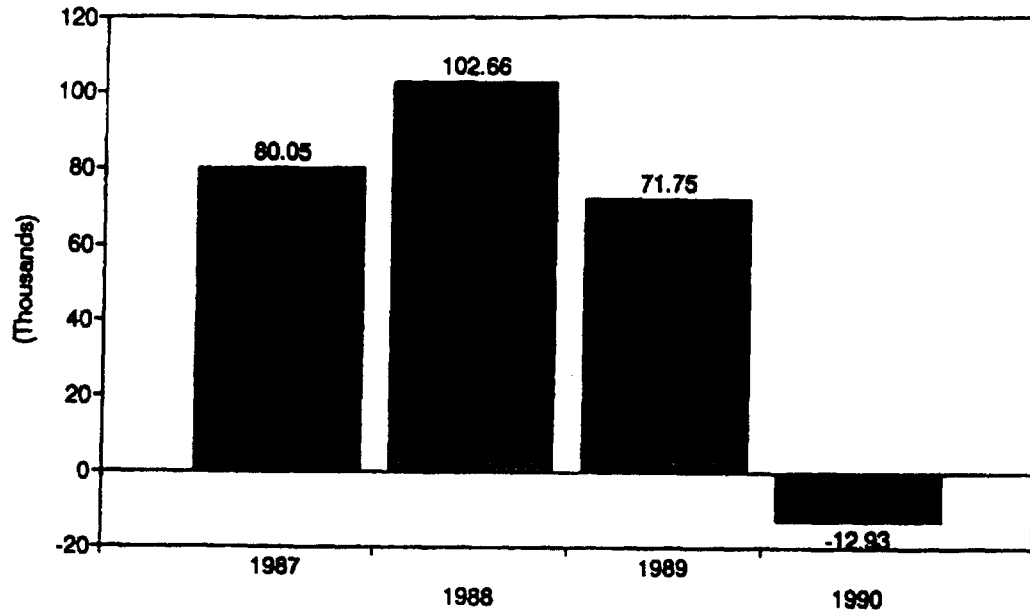
further lowered the revenues generated by FM stations. Figure 1 shows the average FM station net revenues for these four years in constant 1987 dollars. The total drop in the average FM standalone station's net revenues, after accounting for inflation, was 15%.

Figure 1
Average FM Standalone Station Net Revenues
Constant 1987 Dollars



Profitability of FM stations also noticeably decreased during this time period. In 1987 the average FM standalone station earned \$80,045 in profits. As mentioned earlier, the average FM standalone station lost over \$14 thousand in 1990. Figure 2 shows the pre-tax profits for these four years in constant 1987 dollars.

Figure 2
Average FM Standalone Station Pre-Tax Profits
Constant 1987 Dollars



As can be seen from this review of financial data, FM stations are financially difficult to face the increased competition from other radio stations and audio services. Their ability to survive is a realistic question in many cases.

EXHIBIT C



TOWN OF VAIL

P.O. Box 567
Vail, Colorado 81658
(303) 479-2200

Department of Police

August 16, 1994

KQMT
1000 Lionsridge Loop
Vail, CO 81657
Attention: Ms. Kaplin

Dear Ms. Kaplin,
Just a brief letter thanking you for the help and support KQMT has shown to the Vail Police Department.

Your station goes out of its way to assist us with all forms of public service announcements. You have proven to be a community orientated radio station dedicated to the Vail Valley.

Thank you for all your assistance in the past, and the Vail Police Department looks forward to working with you in the future.

Sincerely,

A handwritten signature in dark ink, appearing to read "Mark Allen", written over the word "Sincerely,".

Mark Allen
Community Relations/Public Education Officer



292 W. Meadow Drive
Vail, CO 81657
303-479-2279
FAX: 303-479-2197

ADMINISTRATIVE OFFICES
479-2450

SPECIAL EVENTS
479-2465

MARKETING OFFICE
479-2446

VAIL COFFEE HOUSE
1778 Vail Valley Drive
479-2262

GOLF & PARK
MAINTENANCE
1278 Vail Valley Drive
479-2262

RYAN PARK
TENNIS CENTER
700 E. Montego Road
479-2294

JOHN A. DOBSON ARHNA
321 Lombard Circle
479-2271

VAIL YOUTH SERVICES
805 E. Lombard Circle
479-2292

VAIL NATURAL CENTER
Vail Valley Drive
479-2291

August 22, 1994

To Whom It May Concern,


As Marketing Director for the Vail Recreation District, it is my responsibility to promote all of the activities, programs and special events the district offers to local and visiting community members here in Vail.

Whether it be a special event like the Fourth of July celebration, a children's activity or a grass roots effort to support recreational programs in the area, the staff at KOMT have always given their full support to all our community programming. Whether our advertising budget was small or non-existent, we have received sponsorships, public service announcements, news blurbs and participation by the KOMT staff.

I am very pleased to have developed the relationship we currently have with KOMT. Not only do we feel that they care about us as a customer, they realize the big picture and support our programs because they benefit the community as a whole.

We hope to continue to do business whenever possible with the staff at KOMT. It is a fine example of a locally owned and operated business.

Sincerely,


Susan Chardoul
Marketing Director
Vail Recreation District

DECLARATION

I, Patricia Kaplan, an President of Mountain High Communications, Inc., licensee of FM broadcast station KOMT, Eagle, Colorado. I hereby declare under penalty of perjury that I have read the foregoing Opposition of Mountain High Communications, Inc., and that the statements of fact contained therein are true and correct to the best of my knowledge and belief.

Aug. 25, 1994
Date

Patricia Kaplan
Patricia Kaplan, President

CERTIFICATE OF SERVICE

I, Kathleen O'Keeffe, a secretary of the law firm of Arter & Hadden, certify that on this day, August 26, 1994, a copy of the foregoing OPPOSITION OF MOUNTAIN HIGH COMMUNICATIONS, INC. was served by first-class U.S. mail, postage prepaid, upon the following persons:

Ryan B. Smith and Jennifer Tufty
c/o Ryan B. Smith
4026 Helen Court
Rapid City, South Dakota 57702



Kathleen O'Keeffe